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Supreme Court, U.S.
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No. 04-1268

In The
Supreme Court of the United States

TAMARA JEAN PARKS, individually and as Trustee for the heirs and next-of-kin of Perry Parks,

Petitioner,

vs.

MICHAEL POMEROY, in his individual capacity as an officer of the Woodbury Police Department,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT POMEROY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals properly held that Officer Pomeroy was entitled to qualified immunity where, given the state of the law at the time and the particular facts of this case, Pomeroy did not violate a clearly established constitutional right.

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JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. According to Rule 10, compelling reasons may be found if there is a conflict of authority between another court of appeals or state court of last resort on the same issue or if the decision reflects a far departure from the usual course of judicial proceedings or if the decision presents an important question of federal law that has not been but should be settled by this Court.

Petitioner has not set forth an adequate basis to justify the exercise of the Court's discretionary jurisdiction. Petitioner's argument that the Court of Appeals improperly transformed the objective test in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001), into a subjective test is not supported by any studied review of the Eighth Circuit's analysis of the second step of the qualified immunity analysis. Petitioner has failed to set forth a sufficient basis for review by this Court. Further, for the reasons explained below, there was no error in the Eighth Circuit's decision in this case.

STATEMENT OF THE CASE

Officer Michael Pomeroy sets forth the following uncontroverted facts from the record in supplement to the facts set forth in the Memoranda and Orders of the lower courts that Pomeroy also accepts as uncontroverted.

On the evening of June 3, 2000, at 9:45 p.m., Tamara Parks called 911 Emergency Dispatch reporting, "My

husband's drunk and he's getting very violent." Tamara Parks and her husband, decedent Perry Parks, had gone to the Sunset Bar at 5:30 that afternoon. Before leaving for the bar, Tamara observed Perry Parks carrying a beer can. While at the Sunset Bar, Perry Parks consumed three 22-ounce mugs of beer and part of Tamara Parks' second 22-ounce mug. Tamara and Perry Parks had a disagreement in the bar. Perry Parks was affected by the alcohol so Tamara Parks drove home. They left the bar around 9:20 or 9:25 p.m. and arrived at their home in Woodbury at 9:30 p.m.

Upon arriving home at 2704 Horseshoe Lane in Woodbury, a one-sided argument ensued with Perry Parks screaming and swearing at Tamara Parks. Perry Parks was yelling to Tamara Parks, "Fuck you, you're a bitch. I'm sick of this" and repeated this many times. Perry Parks had never sworn at Tamara Parks and had never screamed or hollered like that before. Tamara Parks believed that Perry Parks was getting very violent. Perry Parks came toward her and slammed his hand on the counter. Tamara Parks then grabbed the phone to call 911. Tamara Parks told Perry Parks that if he didn't calm down she was going to call and have him removed. Perry Parks told her to go ahead.

While this was going on in the house, Tamara Parks' two minor daughters were present. One of the daughters was crying. At one point, one of the daughters told Perry Parks that he was drunk.

At 9:45 p.m., Tamara Parks called 911 telling the 911 dispatcher that Perry Parks was getting very violent. Tamara Parks asked the dispatcher to send somebody to 2704 Horseshoe Lane. Tamara Parks further told the 911

dispatcher, "It's a domestic" and that "My husband's drunk and he's getting very violent." (Perry Parks was later determined to have a blood alcohol content of .16).

The 911 dispatcher asked Tamara Parks whether it was physical and she responded, "Well not yet, but it's going to get there." Tamara Parks called for police officers to come and remove Perry Parks. Tamara Parks told the dispatcher, "Can you take him away?" While Tamara Parks was talking to the dispatcher, she told Perry Parks, "Get away from me" in response to Perry Parks coming toward her. Tamara Parks was backing down the hall and was fearful that Perry Parks was coming after her. Tamara Parks then told the 911 dispatcher, "Just come and get him out of here."

At the time that Tamara Parks called 911 Emergency Dispatch to remove her husband who was getting very violent, Officers Jeff Gottstein and Michael Pomeroy were on duty as patrol officers for the City of Woodbury. Gottstein had been a police officer with the City of Woodbury since 1994. Pomeroy had been a police officer since 1988 and had worked as a patrolman for the City of Woodbury since 1994.

Dispatch called for Woodbury police officers to respond to a domestic at 2704 Horseshoe Lane. Officer Gottstein who was designated as "665" responded. The dispatcher then came back and said "665, 2704 Horseshoe Lane. Husband/wife. Male is DK. No weapons. It's not physical at this point, but it sounds like it might get there." Dispatch further indicated that the name was Parks. Dispatch then asked for a squad to assist and Officer Pomeroy responded he would be en route to the incident. The dispatcher informed the officers that it was a husband and

wife domestic, that the husband was drunk and children were involved.

According to Tamara Parks, after Officers Gottstein and Pomeroy entered the residence, they ended up in the kitchen with Perry Parks. Both officers were in full uniform. Perry Parks was standing in the corner of the kitchen near the kitchen sink. The children were upstairs.

One of the officers asked Perry Parks what was going on and received no response. As this was reported as a domestic dispute and Officers Pomeroy and Gottstein had not had an opportunity to assess what was going on, for officer safety reasons, they needed to control the movements of the persons in the house to make sure that the officers and the persons inside the house were safe. Officers Pomeroy and Gottstein observed knives in the kitchen on a counter. The officers overheard Perry Parks make a comment about the knives. Officer Gottstein was concerned about Parks' access to the knives. Due to Perry Parks' increasing agitation, the officers attempted to convince Parks to go into another room and keep him away from the knives.

One of the officers allegedly then said, "We're going to get you out of here." From the upstairs of the residence, Tamara Parks' daughter could hear the police officers say, "Sir" a couple of times and then heard Perry Parks say, "Get out of my space. This is my house." Perry Parks refused to go with the officers. The shorter officer, Gottstein, grabbed Perry Parks by his left arm. Perry Parks put up his arms to stop the officer like he was going to push off. The shorter officer who held Perry Parks by the left arm then "walked into [Parks'] hands."

Officer Gottstein considered Perry Parks' initial movement to be an attempt to grab a knife from that area.

Gottstein grabbed the two knives that he observed on the counter and threw them into a laundry hallway area.

After Perry Parks put out his hands in a manner like he was going to push off, Gottstein walked into Perry Parks' hands and Gottstein lost his balance and took a step back. The 5'5" 170-pound Officer Gottstein then came forward and grabbed the 5'10" 220-pound Perry Parks by the throat with his left hand.

According to Tamara Parks, Perry Parks then flew back into the counter and Parks then came forward away from the counter and scuffling ensued. Perry Parks moved toward the middle of the kitchen. Officer Gottstein stepped back and Perry Parks stepped forward. When Perry Parks stepped forward, Gottstein now had his left hand on Parks' left shoulder. While his left hand was on Perry Parks' left shoulder, Gottstein took out his Oleoresin Capsicum ("OC") spray with his right hand and sprayed. Officers Pomeroy and Gottstein are trained to be able to continue working in an OC contaminated area.

Perry Parks raised his arms and flailed his arms. Perry Parks and Officer Gottstein were struggling and moving toward the middle of the kitchen and the refrigerator. As Perry Parks moved toward the refrigerator, Officer Gottstein was trying to get Parks' left arm while continuing to spray the OC. Officer Pomeroy was right next to Gottstein and, along with Gottstein, backed into a rear entryway into the kitchen. Gottstein ended up bent over with Perry Parks' arm around Gottstein's neck in a headlock. Gottstein was trying to maintain his footing

and, at some point, Parks came down on him causing Gottstein to go down to the ground as well.

Officer Gottstein's duty holster was located on his duty belt on the right side of his hip. In the duty holster was Officer Gottstein's service weapon, a .40 caliber Beretta. When Officer Gottstein went down to the ground he tried to drop his right side to protect his firearm, but ended up flat on his stomach with the right side of his face pinned against the floor. Thus, Gottstein could not see his holster.

Officer Gottstein was on the floor on his stomach with his feet by the refrigerator. Perry Parks was the opposite direction of Gottstein and was facing the refrigerator. Officer Pomeroy was by the desk and counter.

Perry Parks was on his hands and knees and Parks' head was pushed into the officer's right shoulder and Officer Gottstein's head was partially underneath Parks. Gottstein's hand was extended out in front of Gottstein's head and went around Perry Parks' left arm and was holding Parks' shirt. When asked whether Perry Parks was holding Gottstein down on the floor, Tamara Parks' response was that only Perry could answer that. Obviously, Gottstein could also answer that and testified that Perry Parks was physically forcing him to the floor. Gottstein tried to get out from under Parks without success. While flat on his stomach, Officer Gottstein felt his belt and duty weapon being moved. Gottstein believed that Perry Parks had his hand on his weapon. Gottstein struck the wrist to get Parks' hand to release and pulled at his fingers. According to Tamara Parks, Gottstein yelled, "I think he's going for my gun." The transcript of the radio

transmission evidences that Gottstein was reporting "He's trying to get my weapon! I need help here!"

Another police officer responding to the officer's urgent call for assistance was en route when he heard this statement by Gottstein over the radio and described it as a cry for help by someone who was very, very scared. The officer thought by the time he got there, Gottstein would be dead.

In response to Gottstein yelling that Parks was attempting to take his weapon, Pomeroy looked over and observed Gottstein's hand on the grip of his gun and Perry Parks' hand was also on the grip of the gun, covering part of Gottstein's hand and the gun was partially withdrawn from the holster.

Based upon the information given to Officer Pomeroy by his partner, Officer Jeff Gottstein, Officer Pomeroy perceived that there was an immediate danger of death or great bodily harm to his partner and Officer Pomeroy believed that authorized him to use deadly force.

In response to Officer Gottstein yelling that Perry Parks was attempting to take away Officer Gottstein's service weapon, Pomeroy pulled out his service weapon and put the gun into the back of Perry Parks' right shoulder. Officer Pomeroy had considerable fear that Perry Parks was going to gain control of the gun and use the gun against them.

When Tamara Parks witnessed Officer Pomeroy pull out his service weapon in response to Gottstein yelling that Perry Parks was attempting to take Gottstein's service weapon, she screamed, "Perry, Perry" and ran up behind Perry, grabbed his shoulders and tried to pull

Perry Parks apart from the officer. She told Officer Pomeroy not to shoot. Gottstein was still prone on his stomach. Pomeroy warned Perry Parks, "Don't go for the gun." Pomeroy yelled at Perry Parks believing that his partner was telling him what was going on. Perry Parks responded, "I'm not. I can't see." At that point in time, Tamara Parks looked, and saw that Perry's left hand was on the floor and the officer's gun was not being touched. Tamara Parks testified, "**And that's when I looked**, and Perry's hand was on the floor and the officer's gun was not being touched." She could not see Parks' right hand. At that time, Gottstein's right hand was underneath Perry Parks, but she could not see whether he had a hold of Parks at all. Tamara Parks also did not know where Officer Gottstein's left arm and hand were at that point. At no point did Tamara Parks dispute Officer Gottstein's assertion that while Gottstein was on the floor with Parks during the short intense struggle, at some point Perry Parks had his hand on Gottstein's gun.

Officer Pomeroy was kneeling by Perry Parks' right shoulder and Officer Gottstein's left shoulder. Tamara Parks does not know what Pomeroy was doing, but noticed that he had his gun in his left hand and she looked down the gun barrel. Tamara Parks then screamed and backed up to the front of the steps. This was further back than her original location. Pomeroy was on his knees with his chest lying on Parks. Pomeroy attempted to fire his service weapon that he had pressed into Perry Parks' side. Tamara Parks heard a click. The gun did not fire. Pomeroy then attempted a malfunction drill and pulled the trigger a second time, but the weapon still did not fire. Pomeroy again performed the malfunction drill. Tamara Parks

heard a shot. Gottstein was still prone on the floor on his stomach when the shot was fired.

Officer Gottstein believed there was a high level of threat from the time he first felt a hand on [redacted] weapon to the time that the situation ended. Gottstein believed that the threat level was equally high whether or not he had his hand on the primary grip position because that could have changed in a millisecond.

When Pomeroy heard Gottstein yell that Parks was going for his gun, Pomeroy believed that his partner was telling him what was going on. Pomeroy saw no diminishment in the threat from the point at which he heard Gottstein say that Parks had his gun until the time Parks was shot. Pomeroy believed that the threat was increasing because the longer the struggle went on, the more tired Gottstein would become and he would be less and less able to maintain control to prevent Perry Parks from gaining control of the handgun.

After the shot was fired, Perry Parks came up to his knees, and then fell back. Perry Parks died a short time later as a result of a single gunshot wound. The entire incident from the time the officers entered the house until the shot was fired was three to four minutes.

REASONS FOR DENYING THE WRIT

A. Parks' argument that the Eighth Circuit applied a subjective standard instead of an objective standard to the qualified immunity analysis is not supported by reading the Eighth Circuit opinion.

In ruling on a qualified immunity issue, the first step is to determine whether the government official's conduct violated a constitutional right. The Court's next step is to ask whether such right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001).

The Eighth Circuit opinion assumed a constitutional violation and then proceeded to the next step of the qualified immunity analysis asking whether the right was clearly established in accord with *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001).[1] The Eighth Circuit in *Parks* recognized that its inquiry does not end at assuming that at this threshold stage Parks may be able to establish a constitutional violation. The Court recognized that the next sequential step is to ask whether the right was clearly established. "This inquiry remains distinct from the analysis of the excessive force claim." (Citation

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[1] Respondent disagrees with the majority opinion's conclusion that at this threshold stage, Parks may be able to prove that Pomeroy violated Parks' Fourth Amendment rights. For the reasons set forth in the concurring opinion by Judge Colloton, Respondent agrees that it was not even necessary to proceed to the second step in the qualified immunity analysis as, under the first step, no constitutional violation occurred. Because Pomeroy is responding to Parks' arguments concerning the application of the second step of the qualified immunity analysis, Pomeroy does not directly address the first step the existence of a constitutional violation.

omitted). (App. 13). The *Parks* opinion goes on to cite *Saucier*:

> The qualified immunity inquiry . . . has a further dimension. The concern of the qualified immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to *what the law requires* is reasonable, however, the officer is entitled to the immunity defense. *Id.* at 205, 121 S. Ct. 2151 (emphasis added).

(App. 13, 14).

Parks argues that in applying the second step to determine whether the right was clearly established, the Eighth Circuit Court of Appeals improperly transformed *Saucier*'s objective standards into a subjective test. Parks' argument is not supported by the plain language of the opinion in which the Eighth Circuit makes repeated reference to objective reasonableness and frames the issue as an objective inquiry into whether "a reasonable officer in Pomeroy's position would have understood that what he was doing violated the law." (App. 14).[2] Such analysis is entirely consistent with the dictates of the United States Supreme Court in *Saucier*, "the relevant dispositive inquiry in determining whether a right is clearly established is

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[2] App. references Petitioner's Appendix.

whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S. Ct. at 2156. The Court of Appeals in *Parks* held:

> Even if we assume that Pomeroy could see Parks' left hand was on the floor at the time of the shooting, it cannot be disputed that Gottstein's gun was nevertheless just inches from Parks' hand. As in *Nelson*, the physical struggle between Parks and Gottstein was hostile and intense, the circumstances were extremely volatile and potentially deadly, and events were evolving rapidly. Therefore, notwithstanding Plaintiff's citation of arguably contrary Fourth Amendment cases, we hold, upon *de novo* review, that – given the state of the law at the time and the particular facts of this case – Pomeroy did not violate a *clearly established* constitutional right.

(App. 15-16) (Emphasis in original). It is important to note that the Eighth Circuit obviously recognized the importance of analyzing the second step of the qualified immunity analysis as to whether clearly established law was violated because the Eighth Circuit opinion repeatedly bolded the term "*clearly established.*" (App. 13, 16).

The Court in *Parks* further delineated its utilization of an objective standard to conduct its qualified immunity analysis:

> In other words, we now ask, not whether plaintiff may be able to establish a constitutional violation – but, rather, whether she may be able to establish a violation of a constitutional right of which the contours were so defined at the time of the shooting that a reasonable officer in

> Pomeroy's position would have understood that what he was doing violated the law.

(App. 14).

Again, the Eighth Circuit's analysis of the second prong of the qualified immunity standard is wholly consistent with the United States Supreme Court's dictates in *Saucier*.

> Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, in those situations the court will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis is applicable in excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

Saucier, 533 U.S. at 206, 121 S. Ct. at 2158-59.

Although Parks pays lip service to *Saucier*, Parks' arguments actually appear to be in conformity with the Ninth Circuit opinion in *Saucier*, which was resoundingly rejected by the United States Supreme Court. Parks argues that the Eighth Circuit's presumption that Plaintiff may be able to prove that Pomeroy violated Parks' Fourth Amendment rights, establishes unreasonable conduct that prevents the application of qualified immunity on the second step. Parks' argument ignores the distinctive nature of the second step. In *Saucier*, the Ninth Circuit

Court of Appeals held that the qualified immunity analysis is so intertwined with the question whether the officer used excessive force that qualified immunity and constitutional violation should be treated as one question, to be decided by the trier of fact. *Saucier*, 533 U.S. at 197, 203, 121 S. Ct. 2154, 2157. The Supreme Court in rejecting the Ninth Circuit holding, emphasized in *Saucier* that the two questions are not duplicative and must be addressed separately. *Id.* In rejecting the Ninth Circuit's attempted fusion between the two questions, the Supreme Court in *Saucier* stated that the approach cannot be reconciled with *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987). Furthermore,

> The approach the Court of Appeals adopted – to deny summary judgment any time a material issue of fact remains on the excessive force claim – could undermine the goal of qualified immunity to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *See Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092 (1986) (qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.').

Saucier, 533 U.S. at 202, 121 S. Ct. at 2156, 2157. Therefore, Petitioner improperly attempts to blur the first and second steps in analyzing qualified immunity.

Parks then argues that because Perry Parks' hand was not on the officer's service weapon immediately preceding the shooting of Parks, that Parks did not pose a

deadly threat. Parks argues that such a belief by Pomeroy would be a subjective mistake on Pomeroy's part and not comport with the required objective analysis. Parks ignores that the Eighth Circuit in *Parks* considered this fact in light of an objective standard as to whether an officer confronting the actual situation encountered by Officer Pomeroy could reasonably have a mistaken understanding as to whether a particular amount of force is *legal* in those circumstances. The Eighth Circuit's analysis therefore examined Parks' claim that Parks' hand was not on the gun at the moment of the shooting, and engaged in the analysis required by *Saucier* to examine the specific circumstances confronted by the officer in light of clearly established law. That Parks did not have his hand on the gun immediately preceding the shooting of Parks does not mean that it was a violation of clearly established law for an officer to protect the officer and others by use of deadly force when the officer objectively had information that moments earlier his fellow officer had indicated that the subject had attempted to take away that officer's gun and the officer remained in a continuing struggle with the subject. The cases cited by Pomeroy dictate that an officer doesn't have to wait until a gun is pointed at the officer before the officer is entitled to take action. *See, e.g.*, *Billingsley v. City of Omaha*, 277 F.3d 990 (8th Cir. 2002); *Willingham v. Loughnan*, 321 F.3d 1299 (11th Cir. 2003); *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998); *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993).

In *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991), the police officer ordered occupants inside the car to raise their hands. When one occupant raised and lowered his hands several times, an officer, believing that the man was reaching for a gun that would place the officers in danger,

shot him once in the head at a distance of approximately 10 feet. The Fifth Circuit determined the shooting, "was reasonable and not excessive." *Id.* at 500. Reversing the denial of summary judgment based on qualified immunity to the individual officers, the Court explained, "Under these circumstances, a reasonable officer could well fear for his safety and that of others nearby." *Id.* at 501.

These cases and the other cases cited in Parks' Briefs establish that, when you examine the totality of the circumstances, even though a subject may have been unarmed at the moment deadly force was utilized, does not mean that the subject did not pose an imminent threat to the lives and safety of the officers and others. A post-*Saucier* decision made the following holding applicable to the case here:

> Indeed, once Hennessey grabbed the barrel of Detective Smith's gun and tried to pry it from his hand, a reasonable officer would infer a substantial possibility that he was fighting for his life. Maybe he could have hoped that Hennessey simply wanted to disarm him, not shoot him, but that would have been a gamble. Under these circumstances, taking the facts alleged in the light most favorable to Hennessey, Detective Smith could have reasonably shot Hennessey **even if he had just pushed Hennessey back a few feet.**

Billington v. Smith, 292 F.3d 1177, 1185 (9th Cir. 2002). (Emphasis added).

Parks complains that the Eighth Circuit should not have relied on the decision of *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998), because *Nelson* was decided three years before *Saucier*. Parks argues that post-*Saucier*,

Nelson would have been decided under qualified immunity's first step, rather than deciding, as the Court in *Nelson* did, that the defendant in *Nelson* was entitled to qualified immunity because the conduct did not violate clearly established law. Such argument by Parks not only ignores the clear language of the *Nelson* decision which held that the officer's actions did not violate clearly established law, but ignores that long before *Saucier* and *Nelson*, the issue of whether the official's conduct violated a constitutional right was the threshold question.

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the inquiry, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789 (1991).

Saucier, 533 U.S. at 201, 121 S. Ct. at 2156.

Consequently, although the two-step qualified immunity analysis was reaffirmed by the United States Supreme Court in *Saucier*, the two-step test had previously been established as the test at least several years before *Nelson*. Moreover, regardless of whether the Eighth Circuit opinion in *Nelson* hinged on the first or second prong of the qualified immunity analysis, the fact of the matter is that the Eighth Circuit panel in *Parks*, in examining the legal principles set forth in *Nelson* and the particular facts of this case, held that Pomeroy did not violate a clearly established constitutional right. Numerous other decisions also support the Court's conclusion that the actions of Pomeroy did not violate clearly established law. For example, as in *Willingham v. Loughnan*,

261 F.3d 1178 (11th Cir. 2001), *vacated and remanded* by 123 S. Ct. 68 (2002), *reinstated* by 321 F.3d 1299 (11th Cir. 2003), *cert. denied* (Oct. 6, 2003), Officer Pomeroy shot an individual whom the officer had reason to believe seconds before had attempted to kill the officer. At the time Willingham was shot, she was standing unarmed in the door to the kitchen where she had just moments before obtained weapons with which she had tried to kill one of the officers by throwing a knife at him and assaulted another by throwing objects at him. Like Willingham, Parks was neither compliant nor yielding to the officers and remained physically engaged in a struggle with Officer Gottstein from whom, moments before, Officer Pomeroy had obtained information which any reasonable officer would rely on, that is, information that a fellow officer's life was in imminent danger because a subject was attempting to take away the fellow officer's gun.[3] *Willingham* importantly recognizes that:

> The principles and goals of the doctrine of qualified immunity are particularly important in cases like this one: Where police officers are confronting an unpredictable and dangerous situation in which split-second decisions can make the difference between life and death.

Id. at 1187.

> From the vantage point of an officer whose life is jeopardized, a potential arrestee who is neither physically subdued nor compliantly yielding remains capable of generating surprise, aggression

[3] The Eighth Circuit has recognized that an officer may use deadly force on reliance on information from other officers. *See Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993).

> and death . . . police officers cannot be expected to delay or to second-guess decisions that may be made in the heat of a dangerous confrontation with a person engaged in violent criminal conduct.

Id. at 1186-87. The Eleventh Circuit therefore held that:

> Under these circumstances – shooting plaintiff, even if she was unarmed at the moment, did constitute excessive force in violation of the Fourth Amendment, the defendants are entitled to qualified immunity.

Id. at 1187.

Even though Parks, like Willingham, did not have his hand on a weapon at the moment he was shot, Pomeroy would be entitled to qualified immunity based on the following factors considered in *Willingham*:

> 1) plaintiff had just attempted to murder one police officer and assault another (here, undisputedly, we have evidence that Officer Gottstein had communicated to Pomeroy and other police officers through his radio mic that was activated during the struggle, that Parks was attempting to take his service weapon);
>
> 2) the subject was not under police control (again, the Court's recitation of facts, that Parks does not dispute, is that there was an ongoing struggle between Parks and the officers); and
>
> 3) the subject was close to a source of weapons (again, it is undisputed that Parks, during the struggle in which the District Court indicates he was on top of Gottstein, was in close proximity to a weapon).

Willingham, 261 F.3d at 1185. Here, Officer Pomeroy was entitled to act on the perception that Parks had attempted to obtain Officer Gottstein's gun and continued to struggle with the officers. *See Anderson v. Russell*, 247 F.3d 125, 131 (4th Cir. 2001) *citing McLenagan v. Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994) ("We do not think it wise to require a police officer, in all instances, to actually detect the presence of an object in a suspect's hands before firing on him.").

In *Anderson*, 247 F.3d at 130-31, the officer who fired the weapon that shot the plaintiff was held to have reasonably perceived the plaintiff to be armed. Officer Pomeroy also had sound reason to believe that Parks was attempting to get Officer Gottstein's gun based on the statements by Officer Gottstein. "Accordingly, because Russell had sound reason to believe that Anderson was armed, Russell acted reasonably by firing on Anderson as a protective measure before directly observing a deadly weapon." *Id.* at 131. *See also, Milstead v. Kibler*, 91 F. Supp. 2d 895 (W.D. Va. 2000), *aff'd*, 243 F.3d 157 (4th Cir. 2001), *cert. denied* (Oct. 1, 2001); *Boyd v. Baeppler*, 215 F.3d 594, 600 (6th Cir. 2000) ("That the defendants did not see or hear Boyd fire the weapon does not affect whether the police officers, acting reasonably under the circumstances known to them, acted in defense of their own safety and the safety of officers through the use of deadly force.").

The Eighth Circuit accepted Tamara Parks' assertion that she could see Perry Parks' left hand on the floor at the time he was shot and concluded as a matter of law, based on the facts and circumstances confronting the officers, and case law, that qualified immunity applied to bar Parks' claims. Those undisputed facts included:

1) Parks refusing to comply with the officers' orders;

2) During the struggle between Parks and Gottstein, Parks was on top of Gottstein facing the opposite direction;

3) During the struggle, Gottstein felt his duty belt and service weapon being moved and believed that Perry Parks had his hand on Gottstein's weapon;

4) That Gottstein screamed that Parks was trying to take the officer's gun;

5) The radio transmission from the Parks' residence containing the statement by Gottstein screaming, "He's trying to get my weapon! I need help here!";

6) Mrs. Parks did not claim that at no time during the struggle did Mr. Parks have his hand on the gun;

7) Pomeroy saw Parks' hand on the gun and felt Parks hand on the gun earlier.

The Eighth Circuit panel recognized that even though at the threshold stage Plaintiff may be able to prove a constitutional violation, Pomeroy is entitled to qualified immunity, "even if he wrongly, but reasonably, believed his actions were lawful." (App. 14). The Court recognized that there were numerous Fourth Amendment excessive force cases which stand for the proposition that a reasonably objective police officer in Pomeroy's position would have believed that his actions were lawful. (App. 14). The Court of Appeals stated that in light of *Nelson*,

> . . . and other similar precedents, we cannot say that, at the moment of Parks's fatal shooting, Pomeroy reasonably should have known that what he was doing violated Parks's constitutional

> rights. In the present case, even if we assume that Pomeroy could see Parks's left hand on the floor at the moment of the shooting, it cannot be disputed that Gottstein's gun was nevertheless just inches from Parks's hand. As in *Nelson*, the physical struggle between Parks and Gottstein was hostile and intense, the circumstances were extremely volatile and potentially deadly, and the events were evolving rapidly. Therefore, notwithstanding plaintiff's citation of arguably contrary Fourth Amendment cases, we hold, upon *de novo* review, that – given the state of the law at the time and the particular facts of this case – Pomeroy did not violate a *clearly established* constitutional right. "Qualified immunity operates in this case . . . just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force' and to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful." *Saucier v. Katz*, 533 U.S. at 206, 121 S. Ct. 2151 (internal citation omitted).

(App. 15, 16). (Emphasis in original).

Parks next argues that because Parks was shot in the high upper back, the Eighth Circuit decision utilized a subjective standard, as, according to Parks' argument, shooting Parks in the back would be a violation of clearly established law. Again, a reading of the plain language in the *Parks* opinion reveals that the Court utilized an objective test rather than a subjective one. Furthermore, the placement of the shot was clearly found to be irrelevant. This was not a case where Officer Pomeroy alleged that Parks was advancing toward him with a weapon. Here, as in the Eighth Circuit decision of *Krueger v. Fuhr*, 991 F.2d 435 (8th Cir. 1993), "there is no evidence that

requires us to attribute special significance to the fact that Officer Fuhr shot Krueger in the back." *Krueger*, 991 F.2d at 439. Similarly, Officer Pomeroy is not claiming that Parks had been advancing on him when the shots were fired, but rather was utilizing deadly force in response to the objective information he received that Parks was attempting to take Gottstein's gun. Whether the use of force resulted in a shot to Parks' back or front has no relevance to the use of deadly force in this case.

B. The decision below does not conflict with other circuit courts.

The *Parks* decision does not conflict with decisions from other circuit courts and, more importantly, does not conflict with decisions by the United States Supreme Court.

For the proposition that the *Parks* decision conflicts with decisions from other circuit courts, Parks cites the cases of *Cowan v. Breen*, 352 F.3d 756 (2nd Cir. 2003) and *Wilkins v. Scarrott*, 350 F.3d 949 (9th Cir. 2003), *cert. denied* (Oct. 4, 2004). Contrary to *Wilkins*, Pomeroy's entitlement to qualified immunity does not depend on the resolutions of disputed issues of fact in his favor. Accepting Parks' version of the facts demonstrated that Pomeroy's decision to use deadly force to stop Parks was not in violation of clearly established law.

Similarly, the Second Circuit decision of *Cowan* has no relevance to the case at hand. Unlike *Cowan*, Pomeroy has accepted the facts as alleged by Mrs. Parks. In *Cowan*, the Court specifically found that the existence of a fact dispute prevented the Court from proceeding on the issue of qualified immunity:

> Although Breen purports to rely only on the undisputed evidence in demonstrating that there was no constitutional violation of Cooper's rights, his brief on appeal is replete with his own version of the events.

Cowan, 352 F.3d at 762 (quotation omitted).

The *Craighead v. Lee*, 399 F.3d 954 (8th Cir. 2005) and *Flores v. City of Palacios*, 381 F.3d 391 (5th Cir. 2004) cases cited by Parks are inapposite to the present case as neither *Flores* nor *Craighead* set forth principles relevant to the issue here of determining whether the law, in the circumstances faced by Officer Pomeroy, was clearly established. As *Saucier* held, "this inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 194, 121 S. Ct. 2156.

Furthermore, this is not a situation where guidance and precedent are lacking to the circuit courts. The Supreme Court has issued guiding precedents on the issue of the application of the qualified immunity standard in several cases, including *Saucier*, 533 U.S. at 197, 203, 121 S. Ct. 2151 (2001); *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987); and *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), in addition to other Supreme Court cases, and the Eighth Circuit's analysis of the second step of the qualified immunity analysis is not in conflict with the rule of law set forth in those cases.

CONCLUSION

The Eighth Circuit properly held that qualified immunity bars Parks' claim, as a reasonable officer could have believed that the use of deadly force was not in violation of clearly established law during this brief and intense struggle in which Officer Pomeroy reasonably believed that Parks attempted to take control of Officer Gottstein's gun. Furthermore, *Saucier* holds that qualified immunity applies even if Officer Pomeroy had a mistaken understanding as to the amount of force that was legal under the circumstances of this tense and rapidly evolving struggle in which his fellow officer had indicated that Parks was attempting to take away his service weapon.

Therefore, Officer Pomeroy respectfully requests that Plaintiff's Petition for Writ of Certiorari be denied. Parks does not satisfy any of the criteria for exercise of the Supreme Court's discretionary review.

DATED: April 21, 2005 Respectfully submitted,

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